X v. COMPTROLLER OF INCOME TAX

[O. C. J. (Buhagiar J.) December 10, 1956]

[J. B. — Originating Summons No. 10 of 1956]

Income Tax Ordinance, 1947 — Application to set aside judgment for income tax — No appeal from assessment.

This was an application to set aside a judgment on a claim for the sum of $8,022/- for income tax. The sum had been assessed by the Comptroller of Income Tax under section 68 of the Income Tax Ordinance. No appeal was made against the assessment and when the action for the sum assessed was brought in court the applicant did not contest the suit. After judgment was obtained the applicant paid the amount due apart from a small balance in respect of interest and costs by instalments. Subsequently the applicant applied to set aside the judgment.

Held: (1) the delay in this case together with the other circumstances was a bar to the exercise of the court's discretion in favour of the applicant;

(2) as the applicant had not exercised his right of appeal against the assessment, the assessment must be regarded as final and conclusive and the Court was not free to re-open the assessment.

Cases referred to :—

(1) *Evans v. Bartlam* (1937) A.C. 473.

(2) *Allen v. Sharp* (1848) 2 Ex. 352.

(3) *R. v. Bloomsbury Income Tax Commissioners* (1915) 3 K.B. 768.

(4) *R. v. Swansea Income Tax Commissioner* (1925) 2 K.B. 250.

INCOME TAX APPLICATION.

R. Murugason for the applicant.

H. Hickling (Federal Counsel) for the respondent.

Buhagiar J. : — This is an application to set aside the judgment entered in the Johore Bahru High Court Civil Suit No. 41 of 1953 pursuant to an Order of Court made on the 20th day of February, 1954. As appears from the affidavit in support of the application, the claim against the defendant was for the sum of $8,022 for income tax as assessed by the Comptroller of Income Tax under the provisions of section 68 of the Income Tax Ordinance, 1947 for the years 1948, 1949, 1950 and 1951. The defendant in a letter addressed to the Federal Counsel written soon after the summons was served on him stated that he was not contesting the claim in the suit, and requested that stay of execution of the judgment be obtained until certain payments he was expecting were made to him by the British Adviser, Johore, and stated that he trusted that until then he would be allowed to pay the sum of $150 p.m. After judgment was obtained against him, the applicant (defendant) made arrangements to settle the amount due by monthly payments of $300 and between the 12th September, 1954 and the 26th April 1955, the applicant paid the sum of $8,086. The Notice of Motion to set aside the judgment is dated the 23rd September, 1956.

On the facts as stated above alone, there is no reason for exercising the discretion of the Court in favour of the applicant. He never applied for leave to defend but stated that he did not propose to contest the claim and submitted to judgment; when judgment was entered he agreed to pay the sum by monthly instalments and he did pay the whole amount (apart from a small balance due in respect of interest and Court costs) and his application to set aside the judgment is dated two years and seven months after judgment was entered. The delay together with other circumstances is, in my opinion, a bar to the exercise of the discretion in favour of the applicant and on this ground alone the application should be dismissed.

In the affidavit in support of the application and in the course of argument during the hearing, points were raised to show that the applicant had a good ground of defence on the merits. In view of these submissions I propose to deal with these points. I would point out in the first place that before the Court or a Judge can exercise the power conferred or setting aside judgments, the applicant is not bound to prove (a) that he had some serious defence to the action and (b) that he had some satisfactory explanation for his failure to enter an appearance to the claim. That the applicant had to prove these two points was argued by counsel for the respondent in *Evans v. Bartlam*[1], but Lord Russell of Killowen (at p. 481) could find no justification for this view in any of the authorities and he went on to say (at p. 482) :—

"The contention no doubt contains this element of truth, that from the nature of the case no judge could, in exercising the discretion conferred on him, by this rule (O. 13, r. 10), fail to consider both (a) whether any useful purpose could be served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action, and (b) how it came about that the applicant found himself bound by a judgment regularly obtained, to which he could have set up some serious defence. But to say that these two matters must necessarily enter into the Judge's consideration is quite a different thing from asserting that their proof is a condition precedent to the existence or exercise of the discretionary powers to set aside a judgment signed in default of appearance."

The facts in support of the contention that the applicant had a good ground of defence are set out in paragraphs 4, 5 and 6 of the affidavit, as follows :—

"4. In the circumstances stated in paragraphs 2 and 3 herein I did not obtain any gains or profits from any business, profession or vocation and also rents, royalties, premiums and any other profits arising from any property left by the testator. I am advised and verily believe that I, as the executor of the estate of the testator, am not a person liable to pay any income tax under the provisions of section 10 of the Income Tax Ordinance, 1947.

5. Previous to the issue of the above Plaint and the Summons in this Suit I have informed the Comptroller of Income Tax repeatedly that I am not working

and/or tapping the said estate belonging to the testator and that there was no income at all.

6. I am advised and verily believe that I am not a person chargeable with tax as prescribed in Section 68(1) of the Income Tax Ordinance and notwithstanding the facts deposed to in paragraph 5 herein, the Comptroller of Income Tax proceeded to assess under the section based on a wrong notion and opinion."

I do not consider that the facts as stated above amount to a valid defence to the action because the applicant failed to avail himself of the provisions of the Income Tax Ordinance, 1947, which gave the right of appeal to any person aggrieved by any assessment made upon him; in default of any such appeal the assessment is final and conclusive, and this Court is not free to re-open the assessment. In *Allen v. Sharp*[2], Parke J., at p. 366, stated: "An assessment not appealed from stands precisely in the same situation as one confirmed after appeal." This statement has been quoted with approval by Avory J., in *Rex v. Bloomsbury Income Tax Commissioners*[3] at 790 — see also *Rex v. Swansea Income Tax Commissioner*[4].

In the course of the argument the learned counsel for the applicant also submitted that the defendant was not liable to pay income tax because the assessment which was purported to be made under section 68(3) of the Income Tax Ordinance was not served on the defendant as required by section 72 of the Ordinance. There is no allegation of this fact in the affidavit in support of the application, but the learned Counsel relied on statements contained in letters referred and attached to the affidavit. Now while the affidavit proves the fact that those letters have been sent or received, it does not prove the truth of the contents of those letters. That fact, therefore, cannot be taken into consideration. But even assuming that notice of assessment was not served on the defendant as alleged, the defendant must have had knowledge of that assessment before judgment was entered against him and he had ample opportunity of contesting the assessment by appeal or by other means available by law before the judgment was signed.

For the above reasons, the application is rejected with costs.

Application rejected.

Re KOH SEK LIM, DECD. THE PUBLIC TRUSTEE v. KOH KONG WAN & ANOR.

[O. C. J. (Whyatt C.J.) January 17, 1957]

[Singapore — Originating Summons No. 96 of 1956]

Settled Estates Ordinance (Cap. 20), s. 27 — Power to order rents or payments reserved under a lease or any part of such rents or payments to be applied for capital purposes — Whether mine is an open mine.

This was an application by the Public Trustee, as trustee of the Will of Koh Sek Lim deceased. The Public Trustee asked for authority to grant leases over an area of 15 acres of land belonging to the estate of the deceased for the purpose of removing building sand and for directions as to the application of the royalties received from such leases as between life-tenants and remaindermen. It appeared that at the time of the deceased's death one sand pit on the land had been worked.

Held: (1) as the sandpit had been worked in the lifetime of the deceased the mine was an open mine and therefore under the common law the life tenants have the right to the proceeds obtained from working it, whether the workings were from the old pit or from new pits;

(2) section 27 of the Settled Estates Ordinance gives power to the Court where it authorises a running lease to order part of the royalties received under the lease to be applied to any of the four capital purposes prescribed in that section.

Cases referred to:—

(1) *Campbell v. Wardlaw* 8 App. Cas. 645.

(2) *Greville-Nugent v. Mackenzie* (1900) A.C. 83.

(3) *Earl Cowley v. Wellesley* 35 Beav. 635.

(4) *Elias v. Snowden Slate Quarries Co.* 4 App. Cas. 454.

(5) *In Re Maynards Settled Estate* (1899) 2 Ch. 347.

ORIGINATING SUMMONS.

W. G. Alcock (*A. W. Ghows* with him) for the plaintiff.

P. F. de Souza (*Nancy Yeap* with him) for the life-tenants.

Wee Chong Jin for the remaindermen.

Whyatt C.J. : — This summons was issued by the Public Trustee, as trustee of the will of Koh Sek Lim, for the purpose of obtaining the decision of the Court on certain questions which have arisen in connexion with the administration of the trusts of the will, and for the purpose of these proceedings Koh Kong Wan, the son of the testator, was appointed to represent the interests of the tenants for life, and Harry Koh Teck Hin to represent the interests of the remaindermen. The facts, so far as they are material, may be summarised as follows. In 1924 the testator purchased a parcel of land, known as the Gulega Bedok Estate, which at that time comprised 536 acres. Substantial portions of the estate were subsequently purchased by the Crown under compulsory powers and the area now held by the trustee of the will is only 192 acres. Of this approximately 90 acres is suitable for building; the remaining area is very valuable as it contains extensive deposits of building sand which have produced large